

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
Carrier Reports of CPNI Compliance	)	EB Docket No. 06-36
	)	EB-06-TC-060
	)	
	)	
	)	

**PETITION OF COMPTTEL FOR EXPEDITED EN BANC REVIEW**

COMPTTEL<sup>1</sup>, by its attorney, hereby respectfully petitions the Federal Communications Commission (Commission) to review, *en banc*, the Public Notice issued by the Enforcement Bureau on January 30, 2006, that imposes new obligations on telecommunications carriers to submit records to the Commission.<sup>2</sup> COMPTTEL submits that the Bureau has acted outside of its

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<sup>1</sup> COMPTTEL is the leading industry association representing communications service providers and their supplier partners. Based in Washington, D.C., COMPTTEL advances its member's business through policy advocacy and through education, networking and trade shows. COMPTTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTTEL members share a common objective: advancing communications through innovation and open networks.

<sup>2</sup> "Enforcement Bureau Directs All Telecommunications Carriers to Submit CPNI Compliance Certifications," Public Notice, DA 06-223 (rel. Jan. 30, 2006) (EB CPNI Notice). As set out in greater detail below, the Enforcement Bureau has adopted new rules, exceeding its delegated authority, by means of the Public Notice referenced *infra*. By adopting rules in a Public Notice outside of its authority, the Bureau has made it difficult for aggrieved parties to seek review. The Commission's rules, for example, do not anticipate a procedural

delegated authority by adopting new rules that require all telecommunications carriers to submit reports to the Commission, and in so doing failed to comply with both the Administrative Procedure Act and the Paperwork Reduction Act.

On January 3, 2006, the Enforcement Bureau issued a Public Notice requiring “all telecommunications carriers, including wireline and wireless carriers, to submit a compliance certificate to the Commission as required by section 64.2009(e) of the Commission’s rules.”<sup>3</sup> As currently drafted, section 64.2009(e) does not, notwithstanding the Bureau’s statement in its Notice, require submission of any paperwork to the Commission.<sup>4</sup> Rather, the rule requires telecommunications carriers to maintain internal records related to the Commission’s CPNI rules.<sup>5</sup> Indeed, after the Commission adopted its

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challenge to a Bureau-issued Public Notice that adopts new rules. As such, COMPTTEL has captioned this petition as a request for review of the Public Notice. COMPTTEL requests expedited treatment of its petition for review because of the tight timetable established by the Bureau’s Notice – carriers are required to respond by February 6, 2006.

<sup>3</sup> EB CPNI Notice at 1.

<sup>4</sup> 47 C.F.R. § 64.2009(e) requires an officer of each carrier to sign a compliance certificate on an annual basis and maintain internally a statement of steps taken to comply with the Commission’s CPNI rules.

<sup>5</sup> This is clear from the record developed in the Commission’s original CPNI rulemaking proceeding and the comments filed therein. Specifically, in its 1998 CPNI Order, the Commission adopted a new rule, 64.2009(e), that required carriers to maintain an internal document related to compliance with the Commission’s CPNI rules. The Commission noted that it was basing that new rule on a suggestion found in comments filed by AirTouch. *See* CPNI First Report and Order at ¶ 201 (“Finally, we agree with AirTouch that corporate certification is an appropriate and effective additional safeguard.”). The AirTouch comments on which the Commission relied urged the Commission to require local exchange carriers to keep copies of CPNI records “in a public file” so that “[i]nterested parties could then review those materials to ensure compliance with the Commission’s rules.” AirTouch Comments, CC Docket No. 96-115, at 13 (filed June 11, 1996). Nowhere in its comments did AirTouch suggest that the Commission require carriers to submit any kind of report to the Commission, nor did the Commission adopt such a requirement in its Order.

initial CPNI rules in 1998, the Common Carrier Bureau issued a supplemental Order clarifying, *inter alia*, that the CPNI rules in no way required the submission of any records to the Commission.<sup>6</sup> The Bureau's Notice, on the other hand, now requires all telecommunications carriers to submit a "report" to the Commission documenting compliance with the Commission's CPNI rules. The Bureau claims that these new document reporting requirements are necessary because, having solicited such documents from a small number of carriers, the Bureau believes that "further investigation and review of all telecommunications carriers' most recent annual CPNI certifications is required."<sup>7</sup>

Contemporaneous to the issuance of its Notice, the Enforcement Bureau also began taking enforcement action against certain carriers that, pursuant to the Bureau's investigation of a small number of companies, had allegedly failed to demonstrate compliance with the Commission's existing CPNI rules. For example, the Enforcement Bureau took action against

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<sup>6</sup> In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, FCC DA 98-971, at ¶ 13 (1998) ("As one of several CPNI safeguards, the Commission required in the Second Report and Order each carrier to certify that it is in compliance with the Commission's CPNI rules. In describing a carrier's duty, the Commission stated that each carrier must "submit a certification" and that the certification "must be made publicly available." We clarify that the Commission's use of the word "submit" in the order was not intended to require carriers to file such certifications with the Commission. Rather, the order directs carriers to ensure only that these corporate certifications be made publicly available."). This clarification put all carriers on notice that the Commission's rules did not, in fact, require submission of any CPNI-related records to the Commission, and directly contradicts the Enforcement Bureau's contention that such submissions are required.

<sup>7</sup> EB CPNI Notice at 1.

AT&T because, following a specific Bureau request for documentation on January 25, 2006, “AT&T could not demonstrate that it had in its possession a certification that AT&T Corp. had prepared in compliance with section 64.2009(e) of the Commission’s rules.”<sup>8</sup> The Notice of Apparent Liability (NAL) issued by the Bureau against AT&T five days later noted that the Bureau had asked AT&T for a copy of its certificate of compliance with 64.2009(e) of the Commission’s rules, and AT&T failed to provide such a certificate. The Bureau further noted that it had “directed several carriers” to provide copies of certificates of compliance.<sup>9</sup> Based on those responses, the Bureau concluded that “further investigation and review of all telecommunications carriers’ most recent annual CPNI certifications is required.”<sup>10</sup> But rather than continuing to conduct investigations of individual carriers, as it did with AT&T and Alltel, the Bureau instead sought to modify the Commission’s CPNI rules by requiring *every telecommunications carrier* to submit new “carrier[] reports” to the Bureau.<sup>11</sup> Although the Bureau may have authority to investigate violations of the

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<sup>8</sup> *In the Matter of AT&T Inc. Apparent Liability for Forfeiture, File No. EB-06-TC-059*, DA 06-221, at ¶ 5 (rel. Jan. 30, 2006) (AT&T NAL). The same day, the Commission also issued an NAL against Alltel citing similar failure to comply with 64.2009(e).

<sup>9</sup> AT&T NAL at ¶ 3. COMPTTEL does not dispute that the Enforcement Bureau has authority to investigate potential violations of the Commission’s existing rules. 47 C.F.R. § 0.111(a). Nor does COMPTTEL dispute the importance of protecting consumer privacy by enforcing its existing rules. As set out in greater detail below, however, the Enforcement Bureau does not have authority to adopt new rules.

<sup>10</sup> EB CPNI Notice at 1.

<sup>11</sup> EB CPNI Notice at 1.

Commission's rules, it does not have authority to modify the Commission's rules to require all carriers under the Commission's jurisdiction to submit reports to the agency without providing public notice of such proposed rules.

The Administrative Procedure Act (APA) requires the Commission to adopt new rules by means of a notice and comment rulemaking proceeding.<sup>12</sup> Were the Bureau merely announcing a policy of the Commission, rather than adopting new substantive rules, the Public Notice might have been a sufficient vehicle. But the Bureau's Notice imposes affirmative reporting requirements on the entire telecommunications carrier industry, and thus is not merely a statement of policy.

A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications. A general statement of policy . . . does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.<sup>13</sup>

In the Bureau's Notice, the purported statement of policy (requiring telecommunications carriers to "to submit a compliance certificate to the Commission as required by section 64.2009(e) of the Commission's rules") is

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<sup>12</sup> 5 U.S.C. § 553.

<sup>13</sup> *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

in reality the adoption of a new rule, because section 64.2009(e) in its current form does not require submission of anything to the Commission.<sup>14</sup>

The Bureau has made clear its intent to take enforcement action against those carriers that fail to comply with the new paperwork requirements set out in the Notice.<sup>15</sup> The Notice also makes clear that, unlike the current requirement of 64.2009(e), all telecommunications carriers must prepare and submit proof of compliance with the Commission's CPNI rules to the Commission, rather than simply maintaining a level of internal record keeping. Such a rule change requires public notice and comment. As the D.C. Circuit has made clear, "[w]hereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements, new rules that work substantive changes in prior regulations are subject to the APA's procedures."<sup>16</sup> Because the Enforcement Bureau lacks authority to issue notice and comment rulemakings, and in any event has not purported to do so here, it is clear that the Bureau's Notice is defective.<sup>17</sup>

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<sup>14</sup> EB CPNI Notice at 1.

<sup>15</sup> Martin House Commerce Statement at 7 ("We also issued a public notice requiring all telecommunications carriers to submit their most recent certification with us. To the extent that carriers are unable to do so, or do not respond adequately, we are prepared to take appropriate enforcement action against them as well.").

<sup>16</sup> *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (internal citations omitted).

<sup>17</sup> The Commission's rules expressly deny the Enforcement Bureau any authority to act on notices of proposed rulemaking and require that such matters be referred to the full Commission. 47 C.F.R. § 0.311(a)(1).

Indeed, the Commission has already conceded that a notice and comment rulemaking proceeding is required to implement the new rules that the Enforcement Bureau attempted to adopt by public notice.<sup>18</sup> Specifically, in testimony on February 1, 2006, before the Committee on Energy and Commerce of the United States House of Representatives (House Commerce Committee), Chairman Kevin Martin detailed a notice of proposed rulemaking that he has “circulated to my fellow commissioners” that proposed adopting rules that would, *inter alia*, “require all telecommunications carriers to certify on a date certain each year that they have established operating procedures adequate to ensure compliance with the Commission’s rules and file these certifications with the Commission.”<sup>19</sup> In short, the new requirements set out by the Enforcement Bureau in the January 30, 2006, Notice are the subject of a tentative conclusion in a draft NPRM circulating at the Commission. If the Bureau’s Notice merely

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<sup>18</sup> Neither of the exceptions to the APA set out in 5 U.S.C. § 553(b) is applicable in this case. The Bureau has imposed a new obligation on carriers – submission of records to the FCC – and is not interpreting a prior rule, because 64.2009(e) does not require submission of any records to the Commission. Nor is the Bureau issuing a policy statement – it is affirmatively imposing requirements on all telecommunications carriers. Moreover, the Commission has not found – nor does the Bureau attempt to elucidate – that any good cause exists to ignore the requirements of the APA. *See* 5 U.S.C. § 553(b) (“Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”).

<sup>19</sup> Written Statement of Kevin J. Martin, Chairman, Federal Communications Commission, Hearing on “Phone Records For Sale: Why Aren’t Phone Records Safe From Pretexting?”, Committee on Energy and Commerce, U.S. House of Representatives, February 1, 2006 (Martin House Commerce Statement), at 8.

articulated existing requirements, an NPRM proposing to adopt such requirements and the inclusion of a tentative conclusion on that point in the Commission's forthcoming NPRM would not be necessary. Indeed, the EPIC petition for rulemaking that led to the draft NPRM referred to in Chairman Martin's testimony states that current CPNI rules are inadequate and that the Commission should open a rulemaking proceeding to explore the adoption of new rules.<sup>20</sup>

Nor can the Commission argue that the *post facto* adoption of an NPRM will somehow cure its failure to seek comment prior to the issuance of the Bureau's Public Notice. The Commission cannot remedy a defective process by soliciting comment on rules that one of its bureaus has already attempted to put in place and enforce. To the contrary, the Bureau's Notice, combined with the Chairman's public disclosure of the tentative conclusions in the draft NPRM, suggest that the Commission has irreparably pre-judged the outcome of the rulemaking proceeding.<sup>21</sup> Because the Commission failed, in its 1998 and 2002 CPNI rulemaking proceedings, to adopt a requirement that carriers file records with the FCC, the Commission now properly recognizes that a new NPRM is necessary to adopt such a requirement.

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<sup>20</sup> Petition of the Electronic Privacy Information Council for Rulemaking, RM-11277 (filed Aug. 30, 2005).

<sup>21</sup> See *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (the curative effect of an opportunity to comment at a later stage "depends on the agency's mind remaining open enough at the later stage").

The Bureau’s adoption of new reporting requirements is also defective for a second, independent reason. Specifically, the Notice attempts to adopt new reporting requirements without seeking the required review and approval of the Office of Management and Budget (OMB).<sup>22</sup> The Paperwork Reduction Act (PRA) requires all federal agencies to seek approval from the Office of Management and Budget (OMB) of all proposed rules that require “collection of information.”<sup>23</sup> Specifically, the PRA provides that federal agencies “shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information” the Commission complies fully with the provisions of the PRA.<sup>24</sup> The Commission must, before such information collection and submission rules

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<sup>22</sup> Indeed, it is unclear whether the original requirement upon which the Bureau bases its Notice, 47 C.F.R. § 2009(e), was ever properly approved by OMB. A note to § 64.2009 in the C.F.R. indicates that at 67 FR 59213, dated Sept. 20, 2002, § 64.2009 (c), (d), and (f) were submitted to OMB for approval of collection requirements, but there is no mention of the submission of (e) to OMB.

<sup>23</sup> See 44 U.S.C. sec. 3502(3).

“(3) the term ‘collection of information’—

“(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

“(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

“(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

“(B) shall not include a collection of information described under section 3518(c)(1).”

<sup>24</sup> 44 U.S.C. § 3507(a).

can be implemented, conduct a review of the burden imposed by the rules.<sup>25</sup> The Commission must solicit and evaluate public comment regarding the information collection requirements.<sup>26</sup> The Commission must publish notice of the proposed requirements, reporting that OMB approval has been sought, and summarizing the information collection activities proposed by the agency.<sup>27</sup> Finally, the Commission must await approval from OMB before implementing its proposed information collection activities.<sup>28</sup> In the instant matter, the Commission has undertaken none of those processes, but instead has adopted a new information collection rule without notice and comment, and without OMB approval, and has provided affected carriers a total of seven days to comply, or face immediate enforcement action.<sup>29</sup> The

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<sup>25</sup> 44 U.S.C. § 2506(c)(1)(A) provides that the Commission must conduct:

‘(i) an evaluation of the need for the collection of information;  
“(ii) a functional description of the information to be collected;  
“(iii) a plan for the collection of the information;  
“(iv) a specific, objectively supported estimate of burden;  
“(v) a test of the collection of information through a pilot program, if appropriate; and  
“(vi) a plan for the efficient and effective management and use of the information to be collected, including necessary resources.

<sup>26</sup> 44 U.S.C. § 3507(a)(1)(B).

<sup>27</sup> 44 U.S.C. § 3507(a)(1)(D).

<sup>28</sup> 44 U.S.C. § 3507(a)(2).

<sup>29</sup> In 1998, when the Commission first adopted 64.2009(e), it noted that the requirement that carriers maintain records of CPNI compliance fit within the PRA. “Pursuant to this recordkeeping requirement, all telecommunications carriers must maintain in a publicly available file the compliance certificates and accompanying statements. This requirement constitutes a new “collection of information” within the meaning of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520.” In the Matter of Implementation of the

Commission effectively conceded that the rules adopted in 1998 and 2002 as 47 C.F.R. section 64.2009 required OMB approvals, and even submitted those rules for renewed OMB approval in 2005 for an additional three years.<sup>30</sup> But neither the original OMB filing, nor the subsequent renewal, include any OMB approval of CPNI compliance reports filed with the Commission, because such a requirement never existed in section 64.2009.

The Bureau's Notice threatens immediate enforcement action against any carrier that fails to comply, by February 6, 2006, with the new information collection and submission mandate. But the Commission's failure to comply with the requirements of the PRA operates as a bar to any such enforcement action. Specifically, the PRA permits entities that are subject to non-PRA compliant information collection requirements to use the agency's failure to comply with the PRA as an affirmative defense to noncompliance.<sup>31</sup> Nowhere in the Bureau's Notice is there any indication of

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Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket Nos.

96-115 and 96-149, FCC 98-27, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, ¶ 116 (1998) ("CPNI Order"). If a requirement that carriers maintain internal records is subject to the PRA, surely the Commission cannot now argue that a new requirement that carriers prepare and file a report to the FCC is not subject to the PRA.

<sup>30</sup> OMB NO: 3060-0715, Telecommunications Carriers' Use of Customer Proprietary Network Information (CPNI) and Other Customer Information, CC Docket No. 96-115.

<sup>31</sup> "(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if—

"(1) the collection of information does not display a valid control number assigned by the Director in accordance with this chapter; or

"(2) the agency fails to inform the person who is to respond

compliance with the PRA, such as the “control number” that must be assigned by the OMB to PRA-compliant information collection requests.<sup>32</sup> As such, the Bureau cannot take enforcement action against any carrier for failure to comply with the new CPNI reporting requirements until such time as the Commission has obtained proper OMB approval for such rules.

In conclusion, because the Bureau’s Notice is defective pursuant to both the APA and the PRA, and because the Commission is poised to adopt a new NPRM that proposes to create new rules requiring the submission of CPNI compliance reports, the Commission should rescind or otherwise void the January 30, 2006, Notice that unlawfully adopts new reporting requirements and instead move forward with its new NPRM as expeditiously as possible.

Respectfully submitted,

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to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

“(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

<sup>32</sup> 44 U.S.C. § 3507(a)(3) (information collection activities of a federal agency are not valid under the PRA until that agency has “obtained from the Director a control number to be displayed upon the collection of information.”).

February 3, 2006